

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN L. SCHUESSLER,)	
)	No. CV-07-0336-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on May 19, 2008. (Ct. Rec. 15, 17). Plaintiff John L. Schuessler ("Plaintiff") filed a reply brief on May 12, 2008. (Ct. Rec. 19). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 8). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 15).

JURISDICTION

On February 6, 2004, Plaintiff filed applications for Supplemental Security Income ("SSI") benefits and Disability Insurance Benefits ("DIB"), alleging disability since September 1,

1 2002, due to depression, paranoia and 70% deafness in his left
2 ear. (Administrative Record ("AR") 100-102, 198, 414-416).

3 Plaintiff's applications for SSI and DIB were denied initially and
4 on reconsideration.

5 On October 20, 2006, Plaintiff appeared before Administrative
6 Law Judge ("ALJ") John Crickman, at which time testimony was taken
7 from Plaintiff and medical expert Dr. Scott Mabee. (AR 436-466).
8 A supplemental hearing was held on January 19, 2007, at which time
9 testimony was taken from Plaintiff, medical expert Dr. Anthony
10 Francis and vocational expert Debra Lapoint. (AR 467-517). On
11 April 18, 2007, the ALJ issued a decision finding that Plaintiff
12 was not disabled. (AR 18-26). The Appeals Council denied a
13 request for review on September 14, 2007. (AR 7-10). Therefore,
14 the ALJ's decision became the final decision of the Commissioner,
15 which is appealable to the district court pursuant to 42 U.S.C. §
16 405(g). Plaintiff filed this action for judicial review pursuant
17 to 42 U.S.C. § 405(g) on October 23, 2007. (Ct. Rec. 2).

18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing
20 transcript, the ALJ's decision, the briefs of both Plaintiff and
21 the Commissioner and will only be summarized here. Plaintiff was
22 36 years old on the date of the ALJ's decision, had completed the
23 ninth grade and later obtained a GED, and has past work experience
24 as a truss assembler, stone sawer, construction worker, deliverer,
25 production assembler and electronics tester. (AR 26, 100, 495-
26 496, 497-498). Plaintiff indicated on his disability report that
27 he stopped working because he "was unable to concentrate and
28 perform [his] duties as needed." (AR 115).

1 At the administrative hearing held on October 20, 2006,
2 Plaintiff agreed that he "fell off the wagon" at least once since
3 filing for disability benefits, but had not used illegal drugs for
4 at least one year. (AR 458). At the January 19, 2007
5 administrative hearing, medical expert Anthony Francis testified
6 that while the March 2006 report of Plaintiff testing negative for
7 drug usage shows that Plaintiff was apparently drug free on that
8 date (AR 385), it followed that he should be functioning better if
9 he continued to be drug free. (AR 481-483). Plaintiff testified
10 at the January 19, 2007 hearing that it had been over a year since
11 he last used illegal drugs and he was currently living in a clean
12 and sober place. (AR 510-511).

13 SEQUENTIAL EVALUATION PROCESS

14 The Social Security Act (the "Act") defines "disability" as
15 the "inability to engage in any substantial gainful activity by
16 reason of any medically determinable physical or mental impairment
17 which can be expected to result in death or which has lasted or
18 can be expected to last for a continuous period of not less than
19 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
20 Act also provides that a Plaintiff shall be determined to be under
21 a disability only if his impairments are of such severity that
22 Plaintiff is not only unable to do his previous work but cannot,
23 considering Plaintiff's age, education and work experiences,
24 engage in any other substantial gainful work which exists in the
25 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
26 Thus, the definition of disability consists of both medical and
27 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
28 (9th Cir. 2001).

1 The Commissioner has established a five-step sequential
2 evaluation process for determining whether a person is disabled.
3 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
4 engaged in substantial gainful activities. If he is, benefits are
5 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
6 decision maker proceeds to step two, which determines whether
7 Plaintiff has a medically severe impairment or combination of
8 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

9 If Plaintiff does not have a severe impairment or combination
10 of impairments, the disability claim is denied. If the impairment
11 is severe, the evaluation proceeds to the third step, which
12 compares Plaintiff's impairment with a number of listed
13 impairments acknowledged by the Commissioner to be so severe as to
14 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
15 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
16 meets or equals one of the listed impairments, Plaintiff is
17 conclusively presumed to be disabled. If the impairment is not
18 one conclusively presumed to be disabling, the evaluation proceeds
19 to the fourth step, which determines whether the impairment
20 prevents Plaintiff from performing work he has performed in the
21 past. If Plaintiff is able to perform his previous work, he is
22 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
23 cannot perform this work, the fifth and final step in the process
24 determines whether Plaintiff is able to perform other work in the
25 national economy in view of his residual functional capacity and
26 his age, education and past work experience. 20 C.F.R. §§
27 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

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1 The initial burden of proof rests upon Plaintiff to establish
2 a *prima facie* case of entitlement to disability benefits.
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
4 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
5 met once Plaintiff establishes that a physical or mental
6 impairment prevents him from engaging in his previous occupation.
7 The burden then shifts to the Commissioner to show (1) that
8 Plaintiff can perform other substantial gainful activity and (2)
9 that a "significant number of jobs exist in the national economy"
10 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
11 (9th Cir. 1984).

12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a
14 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
15 the Commissioner's decision, made through an ALJ, when the
16 determination is not based on legal error and is supported by
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
18 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
19 1999). "The [Commissioner's] determination that a plaintiff is
20 not disabled will be upheld if the findings of fact are supported
21 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
22 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
23 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
24 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
27 573, 576 (9th Cir. 1988). Substantial evidence "means such
28 evidence as a reasonable mind might accept as adequate to support

1 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
2 (citations omitted). "[S]uch inferences and conclusions as the
3 [Commissioner] may reasonably draw from the evidence" will also be
4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
5 On review, the court considers the record as a whole, not just the
6 evidence supporting the decision of the Commissioner. *Weetman v.*
7 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
8 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

9 It is the role of the trier of fact, not this court, to
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
11 evidence supports more than one rational interpretation, the court
12 may not substitute its judgment for that of the Commissioner.
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
14 (9th Cir. 1984). Nevertheless, a decision supported by
15 substantial evidence will still be set aside if the proper legal
16 standards were not applied in weighing the evidence and making the
17 decision. *Browner v. Secretary of Health and Human Services*, 839
18 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
19 evidence to support the administrative findings, or if there is
20 conflicting evidence that will support a finding of either
21 disability or nondisability, the finding of the Commissioner is
22 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
23 1987).

24 ALJ'S FINDINGS

25 The ALJ found at step one that Plaintiff has not engaged in
26 substantial gainful activity since the alleged onset of
27 disability, September 1, 2002. (AR 20). At step two, the ALJ
28 determined that Plaintiff has the following medically determinable

1 impairments: amphetamine dependence, possibly in early sustained
2 or partial remission, based on self report; personality disorder,
3 not otherwise specified ("NOS") with schizoid and antisocial
4 features; schizotypal personality disorder; mild degenerative disk
5 disease; and hepatitis C. (AR 20). However, the ALJ found that
6 Plaintiff does not have an impairment or combination of
7 impairments that have significantly limited Plaintiff's ability to
8 perform basic work-related activities for 12 consecutive months,
9 and, therefore, Plaintiff does not have a severe impairment. (AR
10 20-25). The ALJ specifically determined that there is no evidence
11 that Plaintiff has a severe mental impairment without substance
12 abuse (AR 22) and that there is no evidence of a severe physical
13 impairment (AR 24). Based on the ALJ's review of the medical
14 record and finding that Plaintiff does not have a severe mental or
15 physical impairment, the ALJ concluded, at step two of the
16 sequential evaluation process, that Plaintiff was not disabled
17 within the meaning of the Social Security Act. (AR 25-26).

18 ISSUES

19 Plaintiff contends that the Commissioner erred as a matter of
20 law. Specifically, Plaintiff argues that the ALJ erred by finding
21 that he does not have a severe mental or physical impairment.
22 This Court must uphold the Commissioner's determination that
23 Plaintiff is not disabled if the Commissioner applied the proper
24 legal standards and there is substantial evidence in the record as
25 a whole to support the decision.

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DISCUSSION

Plaintiff contends that the ALJ erred by concluding that he did not have severe mental or physical impairment. (Ct. Rec. 16 at 10-18). Plaintiff asserts that he provided ample evidence proving the existence of his severe physical and mental impairments. (Ct. Rec. 16 at 11-18). The Commissioner responds that the ALJ properly considered and addressed the medical evidence of record and properly found that Plaintiff did not have a severe impairment or combination of impairments. (Ct. Rec. 18 at 6-16).

Plaintiff has the burden of proving that he has a severe impairment at step two of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical and other evidence that shows that he has a severe impairment. 20 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is severe if it significantly limits one's ability to perform basic work activities. An impairment is considered non-severe if it "does not significantly limit your physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1521, 416.921.

Step two is "a de minimis screening device [used] to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when this conclusion is "clearly established by medical evidence." S.S.R. 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). Applying the normal standard of review to the requirements

1 of step two, the Court must determine whether the ALJ had
2 substantial evidence to find that the record clearly established
3 that Plaintiff did not have a medically severe impairment.
4 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

5 **A. Physical Impairments**

6 Here, the ALJ found that there is no evidence of a severe
7 physical impairment. (AR 24). The undersigned agrees.

8 First, with regard to Plaintiff's cursory argument claiming a
9 severe impairment based on hepatitis C (Ct. Rec. 16), the ALJ
10 noted that there was some reference to hepatitis C in the record,
11 but no observations of debilitating symptoms stemming therefrom.
12 (AR 25). While hepatitis C is mentioned in the record, Plaintiff
13 clearly failed to provide objective medical evidence from
14 acceptable medical sources to establish his hepatitis C
15 "significantly limited" his ability to perform basic work
16 activities. The ALJ thus properly found this impairment to be not
17 severe.

18 With regard to Plaintiff's back complaints, as noted by the
19 ALJ, Plaintiff's alleged back pain was first mentioned in the
20 record on June 24, 2004, nearly two years after his alleged onset
21 date (September 1, 2002). (AR 24, 282-283). David A. Hall, M.D.,
22 indicated that Plaintiff presented with complaints of back pain
23 and was "working on getting disability for this." (AR 282). At
24 the time of the visit, Plaintiff described having back pain "all
25 his life" and denied drug use. (AR 282). Dr. Hall diagnosed
26 "chronic back pain in a patient desiring disability for this."
27 (AR 283). X-rays of Plaintiff's spine taken that day were
28 negative. (AR 284).

1 On June 28, 2004, Plaintiff presented to the emergency room
2 and complained of chronic low back pain that seemed to be
3 intensifying. (AR 307). It was noted that Plaintiff was "in the
4 process of obtaining disability for chronic back pain." (AR 307).
5 He was diagnosed with chronic back pain with recent
6 intensification; however, as noted by the ALJ, the physical
7 examination revealed no adverse findings. (AR 24, 307).

8 Plaintiff became a regular emergency room patient in the
9 summer of 2004, routinely complaining of low back and neck pain.
10 (AR 307-319). On July 23, 2004, it was noted that "patient's
11 presentation is worrisome for the possibility of drug seeking
12 behavior." (AR 314). Plaintiff was advised at that time that he
13 would no longer be prescribed pain medication for his subjective
14 complaints. (AR 314). A lumbar spine MRI administered on July
15 27, 2004, was normal except for mild L4-S1 degenerative facet
16 disease. (AR 320). A cervical spine MRI on July 30, 2004, was
17 normal except for moderate to severe left C3-C4 and moderate
18 bilateral C4-C5 foraminal narrowing. (AR 321-322). An August 3,
19 2004 CT of Plaintiff's cervical spine revealed "no acute changes,
20 just some moderate to severe foramen narrowing that confirmed what
21 he had been diagnosed with on the MRI." (AR 316, 323-324).

22 Narcotic-seeking behavior was again mentioned. (AR 316). The ALJ
23 noted that physical examinations in the emergency room elicited no
24 objective symptoms, other than some tenderness. (AR 25, 307-319).

25 On October 6, 2004, Plaintiff was examined by George W.
26 Bagby, M.D., relative to his neck and low back complaints. (AR
27 325-328). Dr. Bagby noted normal cervical spine views by x-ray
28 and normal appearing lumbar spine by x-ray. (AR 327). For

1 purposes of the orthopedic evaluation, Dr. Bagby diagnosed
2 cervical disc pathology with questionable neurological deficit and
3 lumbar spine disc pathology without objective neurological
4 deficit. (*Id.*) He indicated that, with the information at hand,
5 Plaintiff appeared to have a marked impairment and the ability to
6 perform only light work for a period of six months.¹ (*Id.*)

7 At the administrative hearing on January 19, 2007, medical
8 expert Dr. Anthony Francis testified that Plaintiff had issues
9 with seeking narcotics and had a long history of drug use, mainly
10 street drugs and amphetamine use. (AR 474-479). Dr. Francis
11 opined that "we have a lot of problems here which are totally
12 clouded by the drug use which is documented in several places."
13 (AR 478).

14 With respect to Plaintiff's orthopedic or neurologic
15 condition, Dr. Francis stated that the record reflected only a
16 peripheral mention that Plaintiff may have radiculopathy and that
17 the examining orthopedist, Dr. Bagby, indicated in a fairly
18 extensive report that there was no clear radiculopathy. (AR 479-
19 480). Dr. Francis testified that there was nothing in the record
20 which would cause him to disagree with Dr. Bagby's findings. (AR
21 479). He stated that the record contained no clear documentation
22 of any radiculopathy, and opined that, in the absence of any clear
23 symptoms documented by a physician who is trained in this area, it
24

25 ¹"[A]n individual shall be considered to be disabled . . .
26 if he is unable to engage in any substantial gainful activity
27 by reason of any medically determinable physical or mental
28 impairment which can be expected to result in death or which has
lasted or can be expected to last for a continuous period of not
less than **twelve** months." 42 U.S.C. § 1382c(a)(3)(A) (emphasis
added).

1 was difficult to say whether Plaintiff meets or equals a Listings
2 impairment from an orthopedic standpoint. (AR 478-479).

3 Based on the foregoing, the substantial weight of the record
4 evidence supports the ALJ's conclusion that Plaintiff's physical
5 ability to do basic work activities is not "significantly
6 limited." As noted above, Plaintiff has the burden of proving
7 that he has a severe impairment at step two of the sequential
8 evaluation process and must furnish medical and other evidence
9 that demonstrates he has a severe impairment. 42 U.S.C. §
10 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. An impairment is
11 considered non-severe if it "does not significantly limit your
12 physical or mental ability to do basic work activities." 20
13 C.F.R. §§ 404.1521, 416.921. The evidence of record simply does
14 not demonstrate that any physical ailment significantly restricted
15 Plaintiff's ability to perform work for 12 consecutive months.
16 Since Plaintiff failed to establish that he had a physical
17 condition that significantly limits his ability to perform basic
18 work activities, the ALJ did not err by finding no evidence of a
19 severe physical impairment in this case.

20 **B. Mental Impairments**

21 Plaintiff asserts that, from a psychological standpoint, he
22 provided ample evidence consisting of signs, symptoms and
23 laboratory findings proving the existence of a severe mental
24 impairment. (Ct. Rec. 16 at 15-18). The undersigned does not
25 agree.

26 The ALJ determined that there is no evidence that Plaintiff
27 has a severe mental impairment without substance abuse. (AR 22).
28 The ALJ properly noted that prior to June of 2004, there were some

1 treatment notes indicating that Plaintiff had some mental health
2 issues, but these notes were based entirely on Plaintiff's self-
3 reports, and there are no other mental health reports until
4 February of 2005. (AR 22, 239-249, 341-342). The February 2005
5 notes again contain only self-reporting. (AR 22, 341-342).
6 Although Plaintiff provides a cursory argument that "the ALJ did
7 not offer specific findings properly supported by the record in
8 sufficient detail to reject Mr. Schuessler's symptom testimony"
9 (Ct. Rec. 16 at 15), the undersigned finds that the ALJ provided
10 sufficient rationale for concluding that Plaintiff's statements
11 concerning the intensity, persistence and limiting effects of the
12 alleged symptoms were not entirely credible (AR 22).² Since
13 Plaintiff was properly found not entirely credible, the ALJ
14 appropriately accorded little weight to medical reports based on
15 his subjective complaints.

16 On June 7, 2004, state agency reviewing psychologist, Maximo
17 J. Callao, Ph.D., reviewed the record and completed a Psychiatric
18 Review Technique form. (AR 267-280). Dr. Callao opined that
19 there was insufficient evidence to make a finding regarding the
20 severity of Plaintiff's impairments. (AR 267). On January 14,
21 2005, state agency reviewing psychologist, Sharon Underwood,
22 Ph.D., reviewed the record and also indicated that there was
23 insufficient evidence to make a finding regarding the severity of
24 Plaintiff's impairments prior to January 9, 2003. (AR 291-304).
25 Dr. Underwood determined that Plaintiff's possible depressive

26
27 ²In addition to Dr. Severinghaus' diagnosis of malingering, over and
28 above existing issues (AR 24, 382), the ALJ noted Plaintiff's inconsistent
reports of drug use (AR 22), medical reports noting concerns about
Plaintiff's drug seeking behavior (AR 25), and objective medical evidence
inconsistent with Plaintiff's allegations of limitations (AR 24-25).

1 disorder, polysubstance dependence, in partial remission, and
2 probable antisocial personality disorder resulted in, at most,
3 mild functional limitations. (AR 294-301). The ALJ accorded
4 significant weight to these assessments. (AR 24).

5 On November 30, 2004, Plaintiff underwent a psychiatric
6 evaluation with Paul Michels, M.D. (AR 285-290). Dr. Michels
7 diagnosed Plaintiff with polysubstance dependence in reported
8 partial remission, possible depressive disorder, NOS, and probable
9 antisocial personality disorder and gave Plaintiff a Global
10 Assessment of Functioning ("GAF") score of 65.³ (AR 289). As
11 noted by the ALJ, Dr. Michels indicated that Plaintiff was not
12 involved with mental health treatment and, when discussing
13 employment difficulties, did not mention depression (or back pain)
14 as a factor. (AR 23, 289-290). Plaintiff reported his problems
15 with employment were due to seasonal layoffs, drug problems and
16 not showing up for work. (AR 23, 290). Dr. Michels opined that
17 Plaintiff's substance abuse could be contributing to his
18 subjective sense of depression. (AR 23, 290). Still, Dr. Michels
19 found that Plaintiff's concentration, persistence and pace were
20 good and that Plaintiff was capable of understanding, remembering
21 and carrying out complex and simple tasks. (*Id.*)

22 On February 28, 2006, Plaintiff was examined by John F.
23 McRae, Ph.D. (AR 334-340). Dr. McRae indicated that dates of
24 reported drug use did not coincide with the information provided
25 by Plaintiff at the time of the examination; therefore, there was
26

27 ³A GAF of 70-61 is characterized as: "Some mild symptoms or some
28 difficulty in social, occupational, or school functioning, but generally
functioning pretty well." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 12
(3d ed. Rev. 1987).

1 some question as to Plaintiff's credibility on reporting of his
2 drug use. (AR 335). Furthermore, Dr. McRae indicated Plaintiff
3 had a "fixed stare" that could be a reaction to some type of
4 medication or pills that Plaintiff was taking. (AR 335). Dr.
5 McRae noted that it was "very unlikely one could expect that he is
6 free of drugs as he reports it without having any benefit of
7 treatment." (AR 335). Dr. McRae opined that it was likely, but
8 not certain, that Plaintiff was using, and that the drug use
9 influenced symptoms that Plaintiff described. (AR 336).
10 Nevertheless, Dr. McRae felt that, despite those symptoms,
11 Plaintiff's cognitive and social functioning would not preclude
12 him from carrying out simple repetitive work tasks away from
13 others. (AR 336).

14 On June 20, 2006, Plaintiff was examined by John Arnold,
15 Ph.D. (AR 367-376). Dr. Arnold indicated concerns similar to
16 those of Dr. McRae; specifically, whether Plaintiff was actively
17 using drugs, given Plaintiff had not had formal treatment for his
18 addiction in the past and was opting to camp out rather than
19 access community based homeless services. (AR 368). Dr. Arnold
20 gave a rule out diagnosis of active substance use, diagnosed
21 schizotypal personality disorder with dependent and depressive
22 features and gave a GAF score of 55.⁴

23 While Dr. Arnold noted on the psychological/psychiatric
24 evaluation form that Plaintiff had marked and moderate
25 limitations, Dr. Arnold indicated there was no indication of
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27 ⁴A GAF of 60-51 reflects: Moderate symptoms or moderate
28 difficulty in social, occupational, or school functioning. See
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 alcohol or drug abuse and that the limitations were expected to
2 last no longer than six months. (AR 373-376). Dr. Arnold's form
3 opinions were thus not consistent with his narrative report, as
4 noted by the ALJ (AR 23), and assessed limitations that would not
5 meet the duration requirements of the Act (one year), instead
6 finding they were only expected to last a maximum of six months
7 (AR 376). 42 U.S.C. § 1382c(a)(3)(A).

8 Despite the fact that the three examining medical
9 professionals, Drs. Michels, McRae and Arnold, each indicated that
10 substance abuse may be a contributing factor to Plaintiff's
11 impairments, they did not assess Plaintiff's functioning abilities
12 absent substance abuse. (AR 23). Therefore, the ALJ
13 appropriately discounted the assessments given by these three
14 examining medical professionals. (AR 23).

15 At the October 20, 2006 administrative hearing, W. Scott
16 Mabee, Ph.D., opined that the quality of the assessments of Drs.
17 Michels, McRae and Arnold was insufficient to make more than a
18 brief diagnosis. (AR 23, 445). Dr. Mabee indicated that all
19 three of the consultative examinations noted a possible substance
20 abuse problem that would interfere with Plaintiff's functioning.
21 (AR 447). Dr. Mabee indicated that solid cognitive testing needed
22 to be performed in order to assess Plaintiff's concentration,
23 persistence and pace. (AR 23, 447-448). The ALJ thus requested
24 another consultative examination to address the issues raised by
25 Dr. Mabee. (AR 23).

26 On November 20, 2006, Plaintiff was examined by John B.
27 Severinghaus, Ph.D. (AR 378-384). Dr. Severinghaus noted that
28 "[r]egarding psychiatric issues, there is consistent opinion

1 across clinicians of a history of substance abuse, particularly
2 street drugs and methamphetamines, with minimal alcohol abuse.
3 There is also consistent opinion that [Plaintiff] has not achieved
4 cessation of drug use and that unreported use, or under-reported
5 use, may be continuing." (AR 378). Dr. Severinghaus discounted
6 reports of psychosis including auditory hallucinations, bipolar
7 disorder and clinical depression as unsupported by the record
8 evidence (AR 378), and noted that Plaintiff alleged auditory
9 hallucinations commenced when he was using methamphetamine (AR
10 380). Dr. Severinghaus reported that Plaintiff "acknowledges
11 starting to hear voices three years ago, while 'into meth heavy at
12 the time.'" (AR 381).

13 Plaintiff's responses on the cognitive mental status exam did
14 not indicate significant deficits or deficits strongly suggestive
15 of organic pathology. (Ar 381). Dr. Severinghaus noted that
16 Plaintiff's answers could also reflect evasiveness or deliberate
17 underperformance. (AR 381). While Plaintiff indicated he last
18 used street drugs 18 months ago, Dr. Severinghaus related that he
19 could not rule out continued use/abuse. (AR 381). Dr.
20 Severinghaus diagnosed malingering, over and above existing
21 issues, provisional, but with a high index suspicion; amphetamine
22 dependence, possibly in early sustained or partial remission,
23 based on self report; personality disorder, NOS, with schizoid and
24 antisocial features; schizotypal personality disorder; rule out
25 borderline intellectual functioning; and history of some disc
26 disease. (AR 382). Dr. Severinghaus gave Plaintiff a GAF score
27 of 42-52 and indicated that the "lower rating reflects functioning
28 under the influence of street drugs." (AR 382). He stated that

1 Plaintiff's current psychological functioning was probably fairly
2 well and that while testing suggested exaggeration of problems,
3 existing records plus Plaintiff's overall presentation suggested
4 chronic characterological and substance abuse problems. (AR 382).

5 Dr. Severinghaus opined that Plaintiff has the ability to
6 perform at least some light activities. (AR 382). He found
7 Plaintiff's memory functioning, attention and concentration, and
8 basic problem solving did not appear to be significantly impaired,
9 interpersonal functioning remained fairly limited, yet limited
10 interactions did not appear to be precluded, and pace and
11 persistence did not appear impaired. (AR 382). He noted there
12 were no substantial limitations in activities of daily living or
13 in engagement in brief social contact. (AR 382).

14 Consistent with the ALJ's determination in this case, the
15 weight of the record evidence, as described above, demonstrates
16 that Plaintiff's mental problems are not sufficient to pass the de
17 minimis threshold of step two of the sequential evaluation
18 process. *See, Smolen*, 80 F.3d at 1290. The record exhibits
19 Plaintiff's long history of drug use. As stated by Dr. Francis,
20 "we have a lot of problems here which are totally clouded by the
21 drug use which is documented in several places." (AR 478). The
22 ALJ properly discounted the assessments given by the three
23 examining medical professionals, Drs. Michels, McRae and Arnold,
24 because although all three noted a possible substance use problem
25 that would interfere with Plaintiff's functioning, they each
26 failed to assess Plaintiff's functioning abilities absent
27 substance abuse. (AR 23). As opined by Dr. Severinghaus,
28 Plaintiff's overall functioning is fairly well; however, when

1 Plaintiff is under the influence of drugs his functioning probably
2 declines significantly. (AR 382). The record is simply devoid of
3 any evidence that Plaintiff has a severe mental impairment absent
4 substance abuse. Plaintiff has failed in his burden to show that,
5 without drug use, he has a mental condition that significantly
6 limits his ability to perform basic work activities. 20 C.F.R. §§
7 404.1520(c), 416.920(c). Accordingly, the ALJ appropriately
8 concluded that there is no evidence of a severe mental impairment
9 in this case.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, the
12 Court finds that the ALJ's decision is supported by substantial
13 evidence and free of legal error. Plaintiff is thus not disabled
14 within the meaning of the Social Security Act.

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**)
17 is **DENIED**.

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**)
19 is **GRANTED**.

20 3. The District Court Executive is directed to enter
21 judgment in favor of Defendant, file this Order, provide a copy to
22 counsel for Plaintiff and Defendant, and **CLOSE** this file.

23 **IT IS SO ORDERED.**

24 **DATED** this 3rd day of June, 2008.

25
26 S/James P. Hutton
JAMES P. HUTTON
27 UNITED STATES MAGISTRATE JUDGE
28